

2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys Adopted

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After two years of concentrated effort and the input of many interested persons including several hundred surveyors, the American Land Title Association and the National Society of Professional Surveyors adopted the new 2021 version of the ALTA/NSPS Land Title Survey Minimum Standards in October 2020 effective February 23, 2021.

The most significant changes will be explained in this column, although those who perform Land Title Surveys should carefully review the red-lined version, the final “clean” version, and the Frequently-Asked Questions all of which are available on the NSPS website by going to [NSPS.us.com](https://www.nspssurveyors.com), selecting the “Resources” tab across the top, then picking “Standards” followed by “ALTA/NSPS” from the pull-downs.

Initially, the red-lined version may be most helpful since it shows the 2016 Standards with red-lined strikeouts and underlined additions indicating the deletions and additions that resulted in the 2021 version.

False Imperatives

One of the first changes the reviewer may come across is a number of occurrences of the word “shall” that have been changed to “must” in the 2021 Standards. This does not indicate some fundamental change in the thinking of the joint ALTA/NSPS Committee, but rather simply reflects the United States Supreme Court’s decision in *Gutierrez de Martinez v. Lamagno* 515 U.S. 417 (1995) in which it ruled that “shall” really means “may,” and that “must” is the word that imposes an obligation or command that something is mandatory.

The use of “shall” in earlier versions of the standards was consistent with its common usage at the time; various authoritative references agreed that “must” and “shall” were basically synonyms - both were imperatives. Since “shall” has been ruled to essentially be a false imperative, each such use in the ALTA/NSPS Standards was reviewed and if it was intended as a command, it was replaced with “must.”

Section 2 - The Request for Survey

A number of suggestions were received expressing an interest in the 2021 Standards addressing mineral rights. After considerable discussion, and definitive input from the ALTA members of the committee, it was decided that mineral rights can be so problematic the best way to deal with them was to simply add them to the list of atypical and non-fee interests that a Land Title Survey may involve.

Section 2 gives a number of examples of such properties and directs the surveyor to consult with the interested parties to determine the scope of the related Land Title Survey.

Section 3.D. - The Boundary

There was some concern expressed that the title of this subsection (“Boundary Resolution”) might lead the uninitiated to conclude that the professional surveyor is the final authority as to the location of boundary lines and corners. Of course, surveyors and title professionals know that

a boundary survey is merely a surveyor's professional opinion, and given that, the decision was to drop the word "Resolution" from the title of this subsection.

In addition, previous versions of the Standards had used a number of different terms to describe the property that was the subject of the Land Title Survey. With the 2021 Standards, that property is now referred to as either "*the surveyed property*" or "*the property to be surveyed.*" This change is reflected in several places throughout the 2021 Standards.

Section 3.E. - The Measurement Standards

A long-standing concern over the Relative Positional Precision (RPP) measurement standard and exactly how it was defined has been addressed in the 2021 Standards. The concern had to do essentially with the question of "with respect to what?" This has been addressed in 2021 by referencing the term "local accuracy" and by expressing another manner in which RPP could be calculated (viz., "*using the full covariance matrix of the coordinate inverse between any given pair of points*").

This is not to suggest that a minimally-constrained least squares adjustment is inadequate in estimating the RPP, but to simply shore up the definition with a more solid, statistically-based definition.

In another change to the measurement standard, the application of RPP - which previously included the relationship of the monument or witness marking any corner of the property to the monuments or witnesses marking any other corner of the property - has been limited to only the relationships between adjacent monuments or witnesses.

Section 4 - Records Research

Although this section appears on the red-lined version to have undergone a major rewrite, the order of the included items was merely rearranged for clarity; the actual content changed *very* little. This becomes obvious if the "clean" version of the 2021 Standards is reviewed.

Section 5 - Fieldwork

Section 5 underwent very few changes except for subsections C and E where several notable modifications were made. That being said, however, there is an addition to the introductory comments that clarifies that the precision with which the features in Section 5 are to be located does not apply to the precision of the boundary, which is addressed separately in Section 3.E.

In a major change, subsections 5.E.ii. and iii. now include utility locate markings as evidence of easements. Related to that, subsection 5.E.iv. likewise includes them as evidence of utilities. The requirement also says to identify the source of the markings and include a note if the course is unknown. It must be emphasized that nothing in Section 5 requires an 811 locate request.

Section 5.C.ii. has always called for the locations of features within 5 feet of the perimeter boundary to be located. And Table A item 11 has called for utility poles within ten feet of the perimeter boundary to be located and shown. But when locating and showing utility features on the property became mandatory with the 2016 Standards, the ten foot requirement on utility poles was inadvertently not included in Section 5.E.iv. This has been corrected in 2021.

The result is that all utility features on the surveyed property or within five feet of the perimeter boundary of the surveyed property are to be located and shown, except in the case of

utility poles which must be located and shown if they are on or within ten feet of the perimeter boundary off the surveyed property.

As an aside, attention is drawn here to the almost universally overlooked requirement to show the extent of any potentially encroaching utility pole cross-members.

Section 6 - Plat or Map

Two of the most significant changes to Section 6 occur in subsection C.ii. where two problematic issues have been addressed.

First, some surveyors have encountered lenders who demand that they list *all* of the items shown in Schedule BII of the title commitment on the face of their surveys, whether those items are survey-related or not. Such requests are, in this writer's opinion, ridiculous (this is a *survey* after all and it addresses *survey-related* issues). To tamp down on such requests, Section 6.C.ii. now calls for a "summary of all rights of way, easements and *other survey-related matters...*" (emphasis added).

Second, the ALTA/NSPS Standards have always strived to make certain that the requirements placed on the professional surveyor while undertaking an ALTA/NSPS Land Title Survey are rooted in factual, objective observations. That has been the reason for the avoidance of the word "affects" in the Standards when discussing the impact that an easement may have on the surveyed property.

Whether an easement "affects" a property is dependent not only on *where* the easement plots, but also on the *legal* effect of the easement. For example, if the person who granted the easement in 1920 was not the owner of the property encumbered at the time, that grant is not even valid. Surveyors do not routinely confirm the chain of title related to an easement and neither do title companies. An easement could *plot* on a property, but have no legal or title effect because it was not a valid grant in the first place.

However, lenders and others often focus on the word "affects," so Section 6.C.ii. now suggests that surveyors may want to note whether an easement "affects" the surveyed property *based on the description contained in the record document*. In this way, the word "affects" is qualified as being based only on an objective assessment of *where* the easement plots pursuant to the granting instrument.

In addition to several other revisions, a new subsection viii. has been added to Section 6.C. to outline the surveyor's responsibility when he or she discovers an easement that is not listed in Schedule BII of the title commitment. After a lengthy discussion of the issue in one of the Joint ALTA/NSPS Committee meetings, it was decided that in the event of such a conundrum, the surveyor must notify the title company of the discovery and, unless the insurer can provide evidence that the easement has been terminated, the surveyor must show or explain its existence on the face of the plat or map with a note that the title company has been notified.

Table A

Before outlining the specific and consequential revisions to Table A, two important changes are noted. First, two Table A items have been deleted, so there are now only 19 items.

Second, it has always been the intent - since its inception in 1988 - that the exact wording of each Table A item may be negotiated. It turns out that this is not universally understood, so the introductory paragraph to Table A now makes that fact patently clear.

With regard to the specific and more significant changes to Table A, what had been Item 10.b. (*a determination of whether certain walls are plumb*) has been eliminated. It had been a Table A item for years, but it is not rooted in any title issue (other than the possibility of an encroachment, which is addressed in Section 5.C.). Additionally, clients and lenders often request this item without giving any consideration to what walls - if any - they are actually concerned about. With the 2021 Standards, if there is truly concern about plumbness, it may be negotiated as an additional Table A item.

Table A item 18 - the wetlands item - has also been eliminated. This item has caused confusion since it was introduced in 2011 and is also not rooted in a title-related concern, so rather than trying to tweak it yet again in 2021, the Joint Committee decided to simply strike it. Of course, if the surveyor's firm has a wetlands biologist or otherwise wants to offer a wetlands-related service, for example, through a subcontracting arrangement, that may be negotiated as a Table A item 20.

The call in Item 5 to provide the originating benchmark has been modified to say "*when appropriate*." This addresses when a topographic survey was not actually performed (e.g., contours from some other source were utilized) or when elevations were, for example, established based purely on GPS observations.

Table A items 6(a) and 6(b) have been modified to specify that the zoning report or letter provided to the surveyor must be *specific to the surveyed property*. This is addressed to clients who simply want to dump the entire zoning ordinance on the surveyor, leaving it to him or her to sort out how the ordinance applies to the surveyed property.

One of the most significant changes in the 2021 Standards is to Table A item 11. This utility-related item has been problematic since 1988 primarily because it is very difficult to manage clients' expectations with respect to underground utilities. As a result, the item has been altered a number of times over the years. For 2021, two choices have been introduced.

The possible choices are to show "[e]vidence of underground utilities existing on or serving the surveyed property as determined by (a) plans and/or reports provided by client and/or (b) markings coordinated by the surveyor pursuant to a private utility locate request.

Surveyors will note several important points. First, the plans/reports are now to be *provided by the client*. Second, in most states, 811 locate requests from surveyors are routinely ignored or - at best - given a low priority. So mention of 811 requests has been deleted from the choices.

It is important to note; however, that - as mentioned above - the exact wording of a Table A item is negotiable. So, if the surveyor has ready access to utility plans, then item 11(a) can be modified accordingly. Likewise, if 811 locate requests from surveyors are actually properly attended to in your area, item 11(b) can easily be modified by changing the word "private" to "811."

In order to help control clients' expectations regarding what is actually achievable when it comes to underground utilities, surveyors might want to consider including the qualifying paragraph following Table A item 11 in their scope of work and/or on the face of their plat/map.

HUD Surveys

We were pleased to report that on March 25, 2021, HUD's Office of Multifamily Production Technical Support Division issued *Interim Instructions for Surveyors for Form 91073M Pending HUD Revision of the Form*. Those instructions state, in part:

Multifamily Production will accept the new 2021 ALTA/NSPS survey requirements. A revised HUD-91073M (Survey Instructions and Surveyor's Report) in redline format showing necessary changes to the HUD form to accommodate the underlying changes to the new ALTA/NSPS form is attached. HUD will allow surveyors for Multifamily transactions who use the 2021 ALTA/NSPS requirements to make the redlined edits to the 91073M without HQ review. Please note that these interim instructions are applicable to multifamily applications only, not Office of Health Care.

HUD recommends to participants the following transition and implementation guidance provided by ALTA:

- If you (surveyor) were/are under contract prior to Feb. 23, 2021 you could use the 2016 Standards - even if the survey is not completed until after the 23rd.
- If you (surveyor) were/are under contract prior to Feb. 23, 2021 and you know the survey will not be completed until after the 23rd, it would be logical, but not required to contract to use the 2021 Standards.
- "Updates" must be to the 2021 Standards if they are contracted after Feb. 23, 2021. The only exception to that might be if you (surveyor) contracted to do a 2016 survey before Feb. 23 and, for some reason, the closing was delayed so long that participants (owner, lender, HUD) wanted the survey "updated" before closing. In that case, you might be able to do that update to the 2016 Standards: not for a new conveyance but for the delayed conveyance.

If a new construction or sub-rehab project has a 2016 survey performed for initial closing, but Final Endorsement will occur after March 18, 2021 the final survey should meet the 2021 Standards. The surveyor should be alert to the changes to Table A between 2016 and 2021.

A revised Form 91073M is now in process to update the form to the ALTA 2021 Standard and likely will conclude later in 2021.

Summary

As has been the case with the last few versions of the ALTA/NSPS Standards, virtually every change for 2021 is to the advantage of surveyors by further limiting their liability and/or providing better clarity as to the requirements.

There are a number of changes to the 2021 ALTA/NSPS Standards that are not outlined above; an attempt has been made here to provide some background on only the primary changes. Surveyors should review the redlined version of the Standards in order to be well-informed about *all* of the changes that resulted in the 2021 Standards.

Surveyors should also consider reviewing the FAQs on the NSPS website ([NSPS.us.com](https://www.nsp.us.com) - click on the Resources tab across the top, then select “Standards” followed by “ALTA/NSPS”). Those FAQs will be revised periodically, so if anyone has a question about the standards, they might check that document first.

Finally, the 2021 Standards will be my last as chair of the Joint ALTA/NSPS Committee. It has been a pleasure serving the professions in this capacity over the years and I thank everyone for the opportunity and for their confidence in my work. But 25 years is more than enough and, while I will continue to be involved, I have decided to step down to allow ALTA and NSPS to designate a new chair for the committee.